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**IN THE  
COURT OF APPEALS OF INDIANA**

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ANTHONY W. SHEPARD,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 02A03-0607-CR-316

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable John F. Surbeck, Jr., Judge  
Cause No. 02D04-0509-FB-131

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**December 12, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Anthony W. Shepard was convicted of criminal deviate conduct<sup>1</sup> as a Class B felony, criminal confinement<sup>2</sup> as a Class D felony, criminal recklessness<sup>3</sup> as a Class D felony, domestic battery<sup>4</sup> as a Class A misdemeanor, and invasion of privacy<sup>5</sup> as a Class A misdemeanor after a jury trial. He appeals raising one issue, which we restate as: whether the trial court abused its discretion when it allowed the State to communicate with the victim during a recess taken while the victim was testifying.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In July 2005, A.R. obtained an *ex parte* protective order against Shepard. They had previously lived together and had a relationship, which produced a son. In the early morning hours of August 25, 2005, Shepard went to A.R.'s home in Fort Wayne and took her against her will to a vacant apartment in the Autumn Woods complex. Once there, he removed her clothes, punched her, kicked her, forcibly inserted a beer bottle into her vagina, and fired a gun into the wall near her head. A.R. suffered pain and injury as a result of Shepard's actions.

Shepard was charged with criminal deviate conduct as a Class B felony, two counts of

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<sup>1</sup> See IC 35-42-4-2.

<sup>2</sup> See IC 35-42-3-3.

<sup>3</sup> See IC 35-42-2-2.

<sup>4</sup> See IC 35-42-2-1.3.

<sup>5</sup> See IC 35-46-1-15.1.

criminal confinement each as a Class D felony, criminal recklessness as a Class D felony, intimidation as a Class D felony, domestic battery as a Class A misdemeanor, and invasion of privacy as a Class A misdemeanor. At Shepard's jury trial on these charges, A.R. was called to testify, and on direct examination, she repeatedly testified that she could not remember the details of the incident or the identity of the person who harmed her. *Tr.* at 184-90. The trial court then *sua sponte* called a bench conference, where the following exchange occurred:

State: I'm doing my best.

Trial Court: I . . . It's not your fault.

State: I mean . . .

Trial Court: Let's take a short recess.

State: I mean . . .

Trial Court: We'll figure out whether she's going to testify or not.

Defense: What does that mean? I mean . . .

State: I'm ready to ask you to direct her to answer the question. I think you need to . . .

Trial Court: You don't want . . . You don't want to go there.

State: Well?

Trial Court: Let's take a recess here. We'll see.

. . . .

Trial Court: All right. Let's take a break.

Defense: John?

Trial Court: Yes.

Defense: I assume the separation order is still in effect. I mean, I don't believe it's proper for [A.R.] to vacate the witness stand and consult with either the State or a victim's advocate or anyone else.

Trial Court: Well, I guess I'm going to . . .

State: She can talk to me.

Trial Court: I'm going to overrule that objection.

State: Thank you.

Defense: I guess I'd like to be party.

Trial Court: No. Given the status of this at the time, I've asked counsel to decide whether or not the witness is going to testify. I'm not going to direct her to testify. I think that's inappropriate, given that she's the central character, so I'll allow you to confer with her and you all can decide where we're going.

*Id.* at 190-92. The trial court then recessed for fourteen minutes.

After the recess, A.R. returned to the witness stand and identified Shepard as the person who removed her clothes, punched her, kicked her, inserted the beer bottle into her vagina, and fired the gun into the wall near her head. *Id.* at 192-97. She also testified that she did not want to testify and that she still loved Shepard. *Id.* at 205. On cross-examination, Shepard did not question A.R. about what had occurred during the recess or if any unfair coaching took place. Shepard also recalled A.R. during his case-in-chief and again did not question her about what had happened during the recess.

At the conclusion of the trial, the jury found Shepard guilty of criminal deviate conduct, one count of criminal confinement, criminal recklessness, domestic battery, and invasion of privacy. He now appeals.

## DISCUSSION AND DECISION

The trial court has broad discretion in determining the manner in which a trial is to be conducted. *Roche v. State*, 690 N.E.2d 1115, 1131 (Ind. 1997); *Wray v. State*, 547 N.E.2d 1062, 1066 (Ind. 1989), *trans. denied* (citing *Hubbard v. State*, 514 N.E.2d 1263, 1265 (Ind. 1987)). “The trial court must conduct the proceedings in a manner that facilitates ascertainment of the truth, insures fairness, and obtains economy of time and effort commensurate with the rights of both society and the criminal defendant.” *James v. State*, 613 N.E.2d 15, 23-24 (Ind. 1993). “We will not find error on the part of the trial court’s conduct of a proceeding in the absence of a clear violation of procedural rule or unfair prejudice.” *Roche*, 690 N.E.2d at 1131.

Shepard argues that the trial court abused its discretion when it allowed the State to have a private conference with A.R. during her direct examination. He contends that this confidential meeting between the State and the victim had a substantial impact on the outcome of the trial because, prior to the meeting, A.R. would not testify as to who committed the crimes, but she identified Shepard as the perpetrator after speaking with the State. He believes that there were many other “less perilous methods for remedying the inconsistent or uncooperative witness’s testimony” that the trial court could have employed. *Appellant’s Br.* at 10.

Indiana has previously recognized that a trial court has the discretion to call a recess and allow the State and the victim to participate in a mid-testimony conference. In *Frierson v. State*, 543 N.E.2d 669, 673 (Ind. Ct. App. 1989), the defendant was charged with criminal deviate conduct and criminal confinement, and at his jury trial, the victim testified, but

became emotionally upset during her testimony. *Id.* at 670. The trial court granted the State's request for a recess, but denied the defendant's motion to prevent the State from talking to the victim during the recess. *Id.* On appeal, the defendant argued that the trial court abused its discretion when it denied his motion. *Id.* at 672. Because "it was clear from the record that the purpose of the recess was to allow the victim to regain her composure," this court concluded that the trial court was well within its discretion to allow the State to communicate with the victim during the recess. *Id.* at 673. We also noted that the defendant had the opportunity to cross-examine the victim to explore if any unfair coaching took place during the recess, which he did not do. *Id.* Therefore, no error was found in the actions of the trial court. *Id.*

Our decision in *Frierson* was also consistent with the position taken in several other jurisdictions, which have determined that it is within the trial court's discretion as to whether to allow the State to confer with a testifying witness during a recess. *See U.S. v. DeJongh*, 937 F.2d 1 (1st Cir. 1991) (finding no error where prosecutor and witness met privately between witness's direct examination and cross-examination); *U.S. v. Malik*, 800 F.2d 143 (7th Cir. 1986) (finding no error where witness changed testimony after prosecutor routinely conferred with witness during recesses without trial court's authorization); *People v. Branch*, 634 N.E.2d 966 (N.Y. 1994) (determining that trial court did not abuse its discretion when it allowed recess so that prosecutor could privately confer with witness after witness changed testimony on direct examination); *Will v. Commonwealth*, 525 S.E.2d 37 (Va. Ct. App. 2000) (determining that trial court did not abuse its discretion when it allowed mid-testimony conference between prosecutor and victim so that prosecutor could speak to and comfort

victim); *State v. Delarosa-Flores*, 799 P.2d 736 (Wash. Ct. App. 1990) (finding no abuse of discretion in allowing recess and conference between prosecutor and victim when victim changed testimony after conference). *Contra People v. Pendleton*, 394 N.E.2d 496 (Ill. App. Ct. 1979) (determining that prosecutorial overreaching occurred when prosecutor held conference with witness after witness was unable to identify attackers on direct examination and prosecutor attempted to conceal conference from trial court).

In the present case, the trial court called a recess after A.R. repeatedly testified that she did not remember the details of the incident or the identity of the person who harmed her. The stated reason for the recess was to allow the State to determine if A.R. was going to testify or not. Shepard's counsel objected to the State being able to confer with the victim during this recess, and the trial court overruled the objection. Defense counsel also requested to be allowed to be a party to the conference, which was also denied. The recess was then held and lasted fourteen minutes. Afterwards, A.R. returned to the stand and identified Shepard as the perpetrator of the crimes. She also testified that she had not wanted to testify and that she was still in love with Shepard. On cross-examination, Shepard's counsel did not inquire as to what had transpired during the conference. Additionally, A.R. was called as a witness in Shepard's case-in-chief and was again not questioned as to what occurred in her conference with the State. The trial court was within its discretion to allow the State to confer with A.R. Further, defense counsel had the opportunity on cross-examination to question any unfair coaching he suspected took place during the recess, which he made no attempt to do. We therefore find no abuse of discretion in the trial court's actions.

Affirmed.

ROBB, J., and BARNES, J., concur.